

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-7023

United States Court of Appeals

For the Second Circuit.

NIKIFOROS ZERVOS,

Plaintiff,

against

S. S. SAM HOUSTON and WATERMAN STEAMSHIP
CORPORATION,

Defendants,

WATERMAN STEAMSHIP CORPORATION,

Defendant-Appellant,

and

ADDIS ABABA BANK S. C., NATIONAL BANK OF ETHIOPIA
SOLOMAT, P.L.C., VAN EKRIS & STOETT, INC., LONRAY, INC.,
CONTINENTAL BANK INTERNATIONAL and MARINE MID-
LAND BANK-NEW YORK,

Interpleaded Defendants,

CONTINENTAL BANK INTERNATIONAL,

Interpleaded Defendant-Appellee,
etc.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT-APPELLANT.

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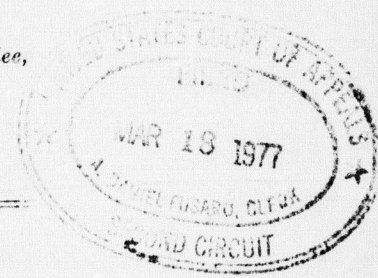


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UNITED STATES COURT OF APPEALS

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ADDIS ABABA BANK S.C., NATIONAL BANK OF ETHIOPIA,
SOLOMAT, P.L.C., VAN EKRISS & STOETT, INC., LONRAY,
INC., CONTINENTAL BANK INTERNATIONAL and MARINE
MIDLAND BANK-NEW YORK,

Interpleaded Defendants,

CONTINENTAL BANK INTERNATIONAL,

Interpleaded Defendant-
Appellee,

etc.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT

ISSUES PRESENTED

This is an appeal from an opinion and final order
of Judge Henry F. Werker filed in the United States District
Court for the Southern District of New York on December 8,

1976 which held invalid two written agreements of indemnity and guarantee. (Appx., 57a-60a) The decision is not reported.

The issues presented for review are as follows:

1. Is the decision appealable under 28 U.S. Code § 1291 as a collateral order under the doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), or under 28 U.S. Code § 1292(a)(3) as an interlocutory decree determining rights and liabilities of parties in an admiralty case?

2. Did Judge Werker err in holding that the agreements were invalid as a matter of law for want of consideration?

STATEMENT OF THE CASE

The main action in this case is a suit to determine the rights of the parties to the proceeds of two shipments of Djimmah coffee carried from Djibouti to the United States on board a vessel owned by defendant-appellant, Waterman Steamship Corporation (hereinafter "Waterman"). The original complaint was filed in admiralty by one Nikiforos Zervos against the vessel, s/s SAM HOUSTON, and against Waterman to recover damages for failing and refusing to deliver the two shipments to the plaintiff as holder of the original bills of lading. (Appx., pp. 9a) In answer to the complaint, Waterman alleged that it had refused delivery to the plaintiff in

consideration of receiving a bank guaranty issued by interpleaded defendant-appellee*, Continental Bank International (hereinafter "CBI"). Waterman filed a counterclaim for interpleader under Rule 22 of the Federal Rules of Civil Procedure naming a number of parties which appeared to have an interest in the coffee, among which was CBI. (Appx., pp.13a). The interpleaded parties have filed numerous cross-claims. (Appx., p.72a).

In its answer to the interpleader, CBI admitted signing two letters of indemnity, but avoided admitting the validity of the letters. It denied any claim to the coffee. (Appx., pp. 24a) Waterman then filed a cross-claim against CBI based upon the letters. (Appx., pp.26a) CBI answered this cross-claim by admitting the issuance of the letters, but alleging that their validity was to be determined by the Court. (Appx., pp.31a) Waterman then made a motion for summary judgment against CBI upon the letters to recover freight and demurrage on the New York shipment, and for various disbursements incurred in defense of the suit. This motion for summary judgment was denied by Judge Werker on the ground that the letters were without consideration. (Appx., pp.61a-73a)

His opinion stated (Appx., pp.70a):

"Having already bound itself by the agreements issued by Addis Bank to deliver the shipments of coffee to the holders of

* See letters Appx., pp. 57a-60a.

the duplicate original bills of lading, Waterman could not thereafter offer the identical consideration to CBI for the issuance of the CBI Agreements. * * *

Within 30 days of the filing of Judge Werker's opinion, Waterman took this appeal. Waterman also requested of Judge Werker that he issue a certificate under Rule 54(b) that there was no just reason for delay in the entry of judgment in favor of CBI, but Judge Werker denied that request, citing Arlinghaus v. Ritenour, Civil No. 75-7616 (2d Cir., Oct. 26, 1976).

STATEMENT OF THE FACTS

The opinion of Judge Werker contains a statement of facts which is very comprehensive. (Appx., pp. 61a-66a) As stated by the Court, the coffee was shipped by one Solomon Mahteme Selassie who was the General Manager of an Ethiopian corporation named Solomat P.L.C. Following shipping instructions, two original bills of lading were issued for 75 tons of coffee each. (Appx., pp. 34a-37a) Bill of lading No. 1 New York named Solomon as shipper, the consignee as "order", and the notify party as Van Ekris & Stoett, Inc. (Appx., p. 36a) Bill of lading No. 2 New Orleans named Solomat as shipper, consignee as "order", and the notify party as Lonray, Inc. (Appx., p. 34a) About two weeks after the bills of lading were issued, Waterman's agent was notified of an alleged theft of the two original bills of lading, and Waterman was re-

requested to issue duplicate bills of lading. (Appx., pp. 38a) The Addis Ababa Bank (hereinafter "Addis Bank") offered to hold Waterman harmless stating: "If you later on deem it necessary, we can make arrangements to back our guarantee via our international correspondent banks in London and New York." (Appx., pp. 41a)

Waterman issued two duplicate bills of lading in exchange for two letters of indemnity signed by Addis Bank. (Appx., 42-43a) The duplicate bills of lading were marked "duplicate" on their faces, and contained the statement: "Bill of Lading issued in lieu original Bill of Lading said to be lost by shipper." (Appx., pp. 44a-47a)

The shipments were then carried to the United States. After they arrived in port, the plaintiff's representatives in Switzerland and later the plaintiff himself, notified Waterman that the plaintiff was in possession of both of the original bills of lading, and wanted delivery of the coffee. Addis Bank and the notify parties claimed that they were entitled to the coffee, and demanded delivery of the coffee to them. Waterman delayed delivery, demanding a United States bank guaranty. On September 25, 1975, Waterman telexed Addis Bank: "UNLESS YOU COMPLY WITH OUR ABOVE REQUESTS FOR RETURN OF BLADINGS 11 AND 14 AND POSTING OF U.S. SECURITY, WE SEE NO OTHER ALTERNATIVE BUT TO REFER MATTER TO UNITED STATES

COURT FOR ADJUDICATION, WHICH WILL DELAY DELIVERY IN-
DEFINITELY." (Appx., pp. 51a)

On September 26, 1976, Addis Bank telexed
Waterman: "PLEASE EXPEDITE ARRANGEMENT WITH CONTINENTAL
BANK N.Y. TO DELIVER GOODS * * * WE HAVE TELEXED THEM AT
18:02 HOURS OUR TIME * * * AND HAVE GIVE THEM FULL
AUTHORITY TO DISCUSS TERMS OF DOCUMENTS YOU REQUIRE * * *."
(Appx., pp. 52a)

On October 2, 1975, Addis Bank telexed Waterman:
"* * * YOU SHOULD BE FULLY SECURED BY BANK GUARANTEE
WHICH WILL BE ISSUED IN YOUR FAVOUR BY CONTINENTAL BANK
INTERNATIONAL NY. * * *" (Appx., p. 54a)

Negotiations as to the terms of the letters of
guaranty took place until October 22, 1975 when two
letters were issued by CBI. (Appx., 57a-60a) These
letters agreed to hold Waterman harmless from any liabil-
ity, guaranteed payment of freight and demurrage and fur-
ther agreed that "we or Addis Ababa Bank will accept,
acknowledge, appear in, and defend on your behalf any and
all actions brought against you, regardless of jurisdic-
tion, which could ultimately lead to a claim under this
guarantee." (Appx., pp. 57a-60a)

FIRST POINT

THE DECISION BELOW IS APPEALABLE UNDER 28 U.S.
CODE § 1291 AS A FINAL DETERMINATION OF A RIGHT UNDER
THE COHEN DOCTRINE OR, ALTERNATIVELY, AS AN INTERLOCUTORY

DECREE IN AN ADMIRALTY CASE UNDER 28 U.S. CODE § 1292(a)(3).

The decision of the Court below finally determined all rights of Waterman under the two letters of indemnity and guaranty issued by CBI. The motion for summary judgment was brought to recover certain disbursements, freight and demurrage, but much more was involved in the decision denying their validity. CBI had agreed to hold Waterman "harmless and keep you and each of you indemnified against all claims and demands of any kind and nature * * * as well as against all loss, damage and expense including costs of court or counsel fees which may arise or be incurred * * *." Counsel fees were and are an important consideration in this case. As shown by the docket sheet (Appx., 1a-8a), this case has been an active one. Discovery is still incomplete and the trial is still months away. CBI agreed to "appear in and defend on your behalf" any actions brought against Waterman. (Appx., pp. 58a-60a) This agreement to take over the defense is an important right, but is denied to Waterman if this decision cannot be appealed and reversed.

In Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), the Supreme Court permitted an appeal from an order denying a corporation's motion that the plaintiff give security for reasonable expenses to the defendants. The Court said at p. 546:

"* * * But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. * * *

* * *

This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. * * *

This decision of Judge Werker finally determines all claims of right Waterman had under the CBI agreements. They are "separable from and collateral to" the rights asserted in the main action. In form, the decision is merely an order denying a motion for summary judgment, but the grounds upon which that decision was rendered finally determine the validity of the agreements, and remove them from the case.

In Federal Glass Co. v. Loshin, et al., 217 F.2d 936 (2d Cir., 1954), Judge Learned Hand said at p. 937:

"* * * Under Rule 56(c), 28 U.S.C.A., to be granted a summary judgment, the moving party must show, not only that there is no 'genuine issue as to any material fact', but also that he 'is entitled to a judgment as a matter of law.' If the decision is based upon these later words, it is obvious that a denial may finally settle a great deal, for usually a later judge will accept the law already laid down in the same action by an earlier judge. * * *

In Volume 9, Moore's Federal Practice, 2d Edition, paragraph 110.10 at p. 133, the text states that the Cohen rule requires three characteristics of an order before it can qualify. They are:

"(1) the order must be a final determination of a claim of right 'separable from, and collateral to,' rights asserted in the action; (2) it must be 'too important to be denied review,' in the sense that it 'presents a serious and unsettled question'; and (3) its review cannot, in the nature of the question it presents, await final judgment because 'when that time comes, it will be too late effectively to review the . . . order and rights conferred . . . will have been lost, probably irreparably.'"

(1) "Separable From and Collateral To"

In this case, Judge Werker's order affects the rights only between Waterman and CBI. The main action concerns the ownership of the coffee, and the carrier's liability for misdelivery. Waterman's claim of rights under the CBI letters does not affect the title to the coffee, nor any other issues in the main action. Whichever way the case finally ends, Waterman's rights under these letters are separate, and have already been determined. There is nothing left to be merged in the final judgment.

CBI made no claim to the coffee and the decision has no bearing upon the ownership of the coffee, nor the outcome of the main action. It has to do entirely with security, expenses, attorneys' fees and defense of the main action.

(2) "A Serious and Unsettled Question"

The decision was rendered on a point of law, and the Judge construed important sections of the Uniform Commercial Code carrier's duty in connection with delivery of goods.

Although carriers have been obtaining similar letters when bills of lading are missing for many years, see Northwestern Cas. & Surety Co. v. Ill. Central R. Co., 19 F 2d 868 (7th Cir., 1927), there are no decisions on their validity since the U.C.C. has been adopted.

The U.C.C. now governs a carrier's rights in most states. It is particularly important, therefore, that this Court review the application of U.C.C. § 7-603* to the facts of this case, a section of the U.C.C. which Judge Werker ignored, and which has an important bearing on the rights of a carrier when faced with conflicting claims to goods.

(3) Review Cannot Await Final Judgment

In determining the appealability of the decision, it is important to take note of the nature of the agreements involved. The agreements are more than mere indemnities. They contain positive guarantees. The agreements state that CBI has agreed and guaranteed "to pay on demand all freights, demurrage and other charges which may be due or appear to be chargeable to said goods."

* See infra, p. 17.

(Appx., 58a-60a) The agreements require CBI to "provide you from time to time with sufficient funds to meet your outlays." (Appx., 58a-60a) They further contain an agreement to "appear in and defend on your behalf any and all actions brought against you * * *."

It is well-settled that there is a distinction between a guaranty and an indemnity. Corpus Juris Secundum, Vol. 38, Guaranty, Section 5 at p. 1135, and Vol. 42, Indemnity, Section 2 at p. 565.

In Joe Heaston Tractor & Imp. Co. v. Securities Accept. Corp., 243 F.2d 196 (10th Cir., 1957) which was a suit on a letter of guaranty, the Court said at p. 199:

"The law is settled that a guaranty is a collateral agreement to pay a debt or perform a duty for another in case of default which may be enforced separately from the primary obligation. It is not necessary to proceed against the primary debtor. An unconditional guaranty is one whereby the guarantor agrees to pay or perform a contract upon default of the principal without limitation. It is an absolute undertaking to pay a debt at maturity or perform an agreement if the principal does not pay or perform. * * *"

Legal expenses in defense of the main action are mounting daily. If these agreements are valid as Waterman contends, there must inevitably be an effect upon the course of the proceedings now pending before the District Court. There are presently three sets of attorneys defending the plaintiff's claim against Waterman. Addis Bank authorized the CBI agreements, and if they are

valid, as Waterman contends, the Addis Bank attorneys should take over the defense now being handled by Waterman's, CBI's and Addis Bank's attorneys. A review after final judgment in the action will be too late to have this effect.

In Gillespie v. U.S. Steel, 379 U.S. 148 (1964) at p. 153, the U.S. Supreme Court said:

"* * * It is true that the review of this case by the Court of Appeals could be called 'piecemeal'; but it does not appear that the inconvenience and cost of trying this case will be greater because the Court of Appeals decided the issues raised instead of compelling the parties to go to trial with them unanswered. * * * it seems clear now that the case is before us that the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided. * * *"

In the present case, expense and time will be saved if this appeal is allowed and the District Court's decision reversed.

The Cohen doctrine has been applied in similar circumstances by the U.S. Supreme Court and by this Court. Swift & Co. Packers v. Compania Colombiana del Caribe, S.A., 339 U.S. 684 (1950); Phelps v. Burnham, 327 F.2d 812 (2d Cir., 1964); Chabot v. National Securities & Research Co., 290 F.2d 657 (2d Cir., 1961); and Glaser v. North American Uranium & Oil Corp., 222 F.2d 552 (2d Cir., 1955).

Rule 54(b) Does Not Apply

Judge Werker has not issued a Rule 54(b) certificate. However, Rule 54(b) does not apply where the Cohen doctrine applies. Chabot v. National Securities & Research Co., supra at p. 659.

In Swanson v. American Consumer Industries, 517 F.2d 555 (7th Cir., 1975), where the Court held the award of attorneys' fees to be a collateral order which was appealable, the Court said at p. 561:

"* * * A 'collateral' order, which according to Cohen v. Beneficial Industrial Loan Corp., supra, 337 U.S. at 546-547, 69 S. Ct. at 1225, does 'not make any step toward the final disposition of the merits of the case and will not be merged in final judgment' and 'is not an ingredient of the cause of action and does not require consideration with it,' cannot be certified under the rule and may be independently appealed.***"

See, also, Redding & Co. v. Russwine Construction Corp., 417 F.2d. 721 (D.C. Cir., 1969) at p. 726, Note 33.

Appealability as an Interlocutory Order
in Admiralty under 28 U.S.C. § 1292(a)(3)

If the decision is not collateral to the main action, it then certainly finally determines "the rights and liabilities of the parties to admiralty cases." It is well-settled that in admiralty cases wherever the rights of one or more parties have been finally determined on the merits, an appeal will lie from an interlocutory order of the Court, 28 U.S.C. § 1292(a)(3).

In O'Donnell v. Latham, 525 F.2d 650 (5th Cir.,

1976), an insurer who was a co-defendant in the action moved for summary judgment and the motion was granted on the ground that the insurance policy did not cover the shipowner. The Court held the order to be appealable since it was entered in an admiralty case and settled the issue of the insurance company's liability under its policy. Although multiple parties were involved, no Rule 54(b) certificate had been issued. The Court said at P. 652:

"We are aware that the district court did not act under Fed. R. Civ. P. 54(b) to determine there was no just reason for delay and direct the entry of this judgment as final. However, the unification of civil and admiralty practice, see Fed. R. Civ. P. 9 (h), does not affect the admiralty cases which are appealable by statute. Further, Rule 54(b) 'does not supersede any statute controlling appellate jurisdiction.' Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 438, * * *."

See, too, In Re S/S Tropic Breeze, 456 F. 2d 137 (1st Cir., 1972) at pp. 138, 139; Ira S. Bushey & Sons, Inc. v. United States, 398 F. 2d 167 (2d Cir. 1968); A. H. Bull S. S. Co. v. United States, 235 F. 2d 1 (2d Cir. 1956); McLain Lines v. The Ann Marie Tracy, 176 F. 2d 709 (2d Cir., 1949).

SECOND POINT

THE DECISION OF THE COURT BELOW IS CONTRARY TO LAW IN HOLDING THAT THERE WAS NO CONSIDERATION FOR THE CBI AGREEMENTS SINCE THE COURT IGNORED U.C.C. SECTION 7-603 AND MISAPPLIED THE LAW IN OTHER RESPECTS.

The gravamen of Judge Werker's decision is contained in the following passage (Appx., pp. 70a):

"Having already bound itself by the agreements issued by Addis Bank to deliver the shipments of coffee to the holders of the duplicate original bills of lading, Waterman could not thereafter offer the identical consideration to CBI for the issuance of the CBI Agreements."

This statement contains three serious errors, any or all of which are sufficient to require a reversal.

First, Waterman was not bound by the agreements issued by Addis Bank to deliver the shipments to the holders of the duplicate bills of lading.

Second, the holders of the duplicate bills of lading had no greater right to a delivery of the goods than had the holder of the original bills of lading.

Third, Waterman did not offer the identical consideration to CBI.

1. Waterman was not bound to deliver to holders of the duplicate bills of lading.

There is nothing in the Addis Bank agreements (Appx., 42a-43a) which says anything about delivery of the cargo whatsoever. The Addis Bank letter of September 5,

1975 (Appx., pp. 41a) requests Waterman's assistance in preventing negotiation of the original bills of lading. The indemnities of September 16 (Appx., 42a-43a) recite that the original bills of lading "have either been lost or destroyed." It is clear from this that at the time of the issuance of the duplicate bills of lading, it was still thought that the original bills of lading might never be negotiated and presented to Waterman. At that time, the question of conflicting claims for delivery of the goods was only theoretical.

A bill of lading has three distinct functions. It acts as a receipt for the goods, as a contract of carriage, and as a document of title, Gilmore & Black, The Law of Admiralty, 2d Edition, 1975, at P. 93. However, it does not create a title where the shipper has none. Minturn v. Alexander, 5 F. 117 (SDNY, 1880).

The Addis Bank was interested in the bill of lading as a document of title, but "delivery" of the goods refers to the contract of carriage. Waterman's duty as carrier was unchanged by issuance of duplicate bills of lading.

The law applicable to the delivery of cargo by a carrier of goods by sea is the law of the place of delivery. The law applicable to delivery in United States ports is Federal law, but the courts will look to state law for analogy. David Crystal Inc. v. Cunard S.S. Co.,

339 F.2d 295, 298. (2d Cir. 1964)

So long as there was an outstanding original bill of lading, Waterman was bound to deliver the coffee to the holder of the original bill of lading if presented. Section 7-403 of the Uniform Commercial Code; Uniform Bills of Lading Act, § 14; Pomerene Act, § 11 (49 U.S. Code, § 91), Gilmore & Black, The Law of Admiralty, 2d Edition, p. 97, unless it had a lawful excuse.

Judge Werker erred in assuming that provisions of law which applied to the original bills of lading should be applied to the duplicate bills of lading as if the original bills of lading no longer existed.

By the time the shipments had arrived in the United States, Zervos appeared with the original bills of lading, and demanded delivery to him.

The Court ignored that provision of the law which protects a carrier in exactly this situation, Section 7-603 of the U.C.C., reading as follows:

"If more than one person claims title or possession of the goods, the bailee is excused from delivery until he has had a reasonable time to ascertain the validity of the adverse claims or to bring an action to compel all claimants to interplead and may compel such interpleader, either in defending an action for non-delivery of the goods, or by original action, whichever is appropriate."

The same rights are given to a carrier in the Uniform Bills of Lading Act, §§ 20, 21, and in the Pomerene

Act, § 18 (49 U.S. Code, § 98).

It follows from the above that Waterman, faced with two persons claiming possession of the coffee, had an alternative given to it by law to withhold delivery from the holders of either of the bills of lading until Waterman had a reasonable time to determine who was the true owner of the goods, or to bring an action to compel all of the claimants to interplead.

In its finding that there was no consideration for the CBI guarantees, the Court completely ignored this right and the giving up of this right by Waterman in exchange for the CBI agreement. Forebearance from the exercise of a legal right or an act which one has the right to do is sufficient consideration. Williston on Contracts, 3rd Edition, Vol. 1, Section 135, p. 567.

2. The duplicate bills of lading created no rights greater than the rights in the original bills of lading.

The Court quoted U.C.C. § 7-402 which reads as follows (Appx., pp. 69a):

"Neither a duplicate nor any other document of title purporting to cover goods already represented by an outstanding document of the same issuer confers any right in the goods, except as provided in the case of bills in a set, overissue of documents for fungible goods and substitutes for lost, stolen or destroyed documents.***"
(Emphasis added by the Court.)

The Court emphasizes the language underlined,

but that language should not be read as applying to substitute bills of lading issued without a court order. The exception for substitute bills of lading is preceded by "except as provided . . ." "As provided" means "as provided in the U.C.C.", and the only other section in the U.C.C. which mentions substitute bills of lading is Section 7-601(1) entitled "Lost and Missing Documents". That section provides that a court may order the issuance of a substitute document. No other types of substitute bills of lading are mentioned.

Delivery without a court order is permitted by Section 7-601(2), but in such a case, the carrier remains liable to anyone injured and there is no provision for a substitute bill of lading.

It is clear that this is the meaning of "as provided" in Section 7-402 because the sentence also refers to "bills in a set" (provided for in Section 7-304) and "overissuance of documents for fungible goods" (provided for in Section 7-207).

A substitute bill of lading issued by a court under Section 7-601(1) carries with it a right in the goods, but the carrier at the same time is freed of liability under the original bill of lading. A substitute bill of lading, issued by a carrier, however, is merely a "duplicate" and confers no right in the goods.

In Castanola v. Missouri P.R. Co., 24 F. 267 (W.D. Tex., 1885), the railroad issued two bills of lading, one marked "original" and the other marked "duplicate". The buyer of the goods resold the duplicate to a third party and returned the original to the seller without payment. The purchaser of the duplicate sued the railroad for the value of the goods, claiming to be an innocent party. The Court held that the duplicate did not carry title to the goods and dismissed the claim, saying at pp. 269-270:

"This case illustrates the facility with which a consignee who is disposed to defraud the consignor can effect his purpose, if it be held that the duplicate bill represents the goods, and that its transfer to a purchaser takes thereby the legal title to the goods. I am unable to find any adjudicated case in point. I am constrained to believe, for the reasons above indicated, that a transfer of a duplicate bill of lading for value does not carry with it the legal title to the goods, and that the purchaser in this case was put upon notice before he paid for these goods, which should have put him upon inquiry as to what disposition had been made of the original bill of lading; * * *."

In the analogous case of warehouse receipts, it is well-settled that a duplicate document issued while an earlier receipt is still outstanding gives no right in the goods. Gould v. City Bank & Trust Co., 213 F.2d 314 (4th Cir., 1954).

See, also, Curacao Trading Co. v. Federal Ins. Co., 50 F. Supp. 441 (SDNY, 1942), affirmed 137 F.2d 911

(2d Cir., 1943).

It should also be noted that in the Uniform Bills of Lading Act (applicable in Louisiana where the U.C.C. has not been adopted), and in the Pomerene Act, the section relating to duplicate bills of lading reads as follows, 49 U.S.C. § 95; U.B.L.A. § 18:

"A bill, upon the face of which the word 'duplicate' or some other word or words indicating that the document is not an original bill is placed, plainly shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability." (Emphasis added.)

3. Waterman offered a new consideration for the CBI agreements, not the identical consideration.

The CBI letters represented bilateral contracts. Each party made promises which were the consideration for the promises of the other party.

The Judge's opinion quotes the consideration recited in the Addis agreements (Appx., pp. 67a) and the consideration recited in the CBI agreements. (Appx., pp. 68a) The difference is obvious to a casual reader. In the Addis agreements, Waterman agreed to issue "new negotiable bills of lading". In the CBI agreements, Waterman agreed "not to deliver" to the holder of the original bill of lading and to give instructions to its personnel to proceed "at once" with the delivery of the said shipments to the named parties.

The Court took a large leap over the obvious in order to come to the conclusion that the consideration was the same. The Court said that "once it went so far as to issue the duplicate original set, Waterman was obliged to deliver the goods to the party presenting them." (Appx., pp. 69a) No reason is given, however, why Waterman would not similarly be obliged to deliver the goods to a bona fide purchaser of the original bills of lading which is exactly what Mr. Zervos claimed to be. The Court said that the risk of someone presenting the original bills of lading "came into existence the minute Waterman issued the duplicate originals." Actually, the risk that someone would present the original bills of lading existed the minute Waterman issued the original bill of lading. Waterman took upon itself a very grave new risk by issuing the duplicate bills of lading, for which it rightfully demanded and got security. The new risk was that the duplicates might now fall into the hands of purchasers, but this new risk arising out of the duplicate bills of lading did not affect or eliminate the risk which already existed that the original bills of lading might be sold to a bona fide purchaser.

This theoretical risk became a real risk when Zervos appeared and Waterman obviously feared its security would be insufficient. It is no wonder Waterman wanted more security from a United States bank. Facts had changed.

The District Court found a duty on the part of Waterman to deliver the goods to the party presenting the duplicate bills of lading. But this duty, if it existed, was a duty to a third person, not to CBI.

The Restatement of the Law of Contracts, § 84(d) reads:

"Consideration is not insufficient because of the fact

* * *

(d) that the party giving the consideration is then bound by a contractual or quasi-contractual duty to a third person to perform the act or forbearance given or promised as consideration, * * *."

As an illustration of the above clause, the American Law Institute states:

"Illustration of Clause (d):

5. A owes B \$10. C promises that he will give A a book in return for A's payment of the debt or in return for A's promise to pay it. The payment or promise of payment is sufficient consideration."

In discussing this section of the Restatement, the following appears in Corbin on Contracts, Vol 1A, § 176, at p. 125:

"* * * suppose that the pre-existing duty is owed to a third person and not to the promisor. Is the performance of this kind of duty a sufficient consideration for a promise? The American Law Institute has stated that it is sufficient. This should be supported for two reasons: (1) the promisor gets the exact consideration for which he bargains, one to which he previously had no right and one that he might never have received; (2) there are no sound

reasons of social policy for not applying in this case the ordinary rules as to sufficiency of consideration. The performance is bargained for, it is beneficial to the promisor, the promisee has forbore to seek a rescission or discharge from the third person to whom the duty was owed, and there is almost never any probability that the promisee has been in position to use or has in fact used any economic coercion to induce the making of the promise. There is now a strong tendency for the courts to support these statements and to enforce the promise.* * *

See also Philips Electronics & Pharmaceutical Ind. Corp. v. Leavens, 421 F. 2d 39, 47 (3rd Cir. 1970); Morrison Flying Service v. Deming Nat. Bank, 404 F. 2d 856, 860 (10th Cir. 1968); DeCicco v. Schweizer, 117 N.E. 807, 221 N.Y. 431 (1917).

At the time the CBI letters were issued, Waterman had several options. It could deliver under the duplicate bills of lading, it could deliver under the original bills of lading, it could deliver to no one, or it could interplead under U.C.C. § 7-603, supra, at p. 17.

In agreeing to deliver the cargo to Van Ekris and Lonray "at once", Waterman was giving up three of those options.

As pointed out on page 18, supra, Waterman's forbearance from delivering to the original bill of lading holder or to require interpleader under U.C.C. § 7-603 was sufficient consideration. Williston on Contracts, 3rd Ed., Vol. 1, § 135, p. 567. It has also been held that forbearance of asserting a claim of lien on cargo, even if no

lien was legally valid, was sufficient consideration. United States v. American Trading Co. of San Francisco, 138 F. Supp. 536 (N.C. Cal. 1956). Forbearance of an invalid claim is good consideration, if it is believed honestly and reasonably that the claim is valid. Restatement of Contracts, § 76(b). Kossick v. United Fruit Co., 365 U.S. 731 (1961).

CBI wanted delivery to "proceed at once" to specifically named companies without first requiring bills of lading or payment of freight. Therefore, even if Watermen had a duty to deliver to holders of the duplicates, this difference from the earlier consideration was sufficient in itself to be consideration for the new agreements.

In Williston on Contracts, 3rd Edition, Vol. 1, Section 131B, at pp. 554, 555, the text reads:

"If the act, the performance of which or the promise of which, is the consideration for the new agreement, differs in any respect from the act which the double contractor was under a previous obligation to perform, the second agreement is binding, for the difference is enough to make the new performance detrimental, or the new promise a promise of something detrimental. * * *"

In U.S. v. Lange, 35 F. Supp. 17, aff'd 120 F. 2d 886 (4th Cir., 1941), cited by Williston, the Court said:

"* * * if the debtor does something more or less different in character from that which he was legally bound to do, such will be sufficient consideration. That is to say, if the act, the performance of which or the promise of which is the consideration for the new agreement, differs in any respect

from the act which one of the parties was under a previous obligation to perform, the second agreement is binding because the difference, however trifling, is enough to make the new performance detrimental or the new promise, a promise of something detrimental.****"

Waterman was under no legal obligation to deliver to anyone but the original bill of lading holder or the true owner. As stated in Gilmore & Black, The Law of Admiralty, 2d Edition at p. 98:

"The determination of who owns the goods is not, and ought not to be, any business of the carrier; in all such cases will be well advised to require the claimants to interplead, and in most cases it does just that."

In giving up its right to deliver to the original bill of lading holder, in giving up its right to file an immediate interpleader action, in agreeing to deliver "at once", and in giving up its right to simply withhold delivery altogether, Waterman gave good and sufficient consideration to CBI for the issuance of its letters of guaranty.

LAST POINT

THE OPINION AND ORDER OF THE DISTRICT COURT
FILED DECEMBER 8, 1976 SHOULD BE REVERSED ON THE LAW AS
REGARDS CONSIDERATION FOR THE AGREEMENTS OF OCTOBER 22,
1975, AND THE CASE REMANDED TO THE DISTRICT COURT FOR
FURTHER PROCEEDINGS CONSISTENT THEREWITH.

Respectfully submitted,

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ATTORNEY

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Attorney, Ethiopian Parties
Date: 3-18-77 Time: 11:00am